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No. 01-1324

IN THE

Supreme Court of the United States

The Metropolitan Government of Nashville and Davidson County and Emmett Turner, Chief of Police of the Metropolitan Police Department,
Petitioners,

v.

Deja Vu of Nashville, Inc., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

This case presents an ideal vehicle to resolve an important and frequently recurring circuit conflict that this Court has already twice granted certiorari to decide: whether the First Amendment guarantees adult businesses a "prompt judicial decision" on appeal from adverse licensing decisions, or instead is satisfied when municipalities provide "prompt access" to judicial review. The ordinance at issue in this case (Ch. 6.54, Metropolitan Code of Nashville and Davidson County ("the Ordinance")) grants adult businesses and entertainers an immediate right of appeal, but it does not mandate a timetable on which a court must grant a writ of certiorari and thus hear the case. The Sixth Circuit, applying that court's settled precedent, which conflicts with decisions of several other circuits, held the Ordinance unconstitutional because it fails to "'assure a prompt judicial decision.'" Pet. App. 33a n.8 (quoting *Freedman* v. *Maryland*, 380 U.S. 51 (1965)) (emphasis omitted). Respondents' contention that this case is an inappropriate vehicle to resolve the conflict because the Ordinance permits judicial review through "common law certiorari" has the matter precisely backwards. Indistinguishable state law certiorari procedures were presented not only in the principal decisions giving rise to the circuit split, but also in *both* of the cases that this Court previously decided to review. The Petition for a Writ of Certiorari accordingly should be granted.

1. Respondents do not dispute that the circuits are in irreconcilable conflict over the principal question presented by the Petition. As this Court has explained, the Sixth Circuit is on the bottom of a four-to-three split. See *Thomas* v. *Chicago Park Dist.*, 122 S. Ct. 775, 781 (2002) (citing cases). Respondents contend in passing (at 17) that this Court miscalculated the conflict in *Thomas* by citing decisions of the First and Seventh Circuits that did not involve "adult business licensing schemes." But this Court correctly recognized that the rationale of the First and Seventh Circuits' rulings places them in square conflict with courts, including the Sixth Circuit, that require a "prompt judicial decision" in the adult-business context. See also, *e.g.*,

MacDonald v. *Chicago*, 243 F.3d 1021, 1031 (CA7 2001) (citing Seventh Circuit precedent to expressly reject, *inter alia*, the Sixth Circuit's leading adult-business licensing case, *Nightclubs, Inc.* v. *City of Paducah*, 202 F.3d 884 (CA6 2000)), *cert. denied*, 122 S. Ct. 919 (2002). Even on respondents' view that the circuits are split three-to-two, the conflict is easily substantial enough to justify review in this Court, as is plain from the orders granting certiorari in both *Thomas*, *supra*, and *City News & Novelty* v. *Waukesha, WI*, 531 U.S. 278 (2001).[1]

2. Every judge to consider respondents' challenge to the Ordinance has concluded that, because administrative rulings for "existing" entertainers and businesses are stayed pending a decision by the court "on the merits" of any appeal (Ord. § .040(E)(3), .070(D)(3)), those administrative rulings do not take effect unless and until the court grants the writ of certiorari and decides the appeal. See Pet. App. 33a n.8, 40a, 99a. The lower courts' construction of Tennessee law is binding absent exceptional circumstances not present here. See *Runyon* v. *McCrary*, 427 U.S. 160, 181-82 (1976). It thus makes no difference that (as respondents belabor (at 11-15) and the Petition acknowledged (at 5-6 n.6)) petitioner contended at oral argument before the district court that the denial of a writ of certiorari was a decision "on the merits."

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[1] Nor do respondents even attempt to dispute the great importance of the question presented. An array of municipalities nationwide now face challenges to their content neutral adult-business licensing schemes because they are powerless to guarantee that the state courts will decide appeals from administrative rulings by a date certain. See generally IMLA *Amicus* Br. Both petitioner and the State of Tennessee have been required to amend their municipal and state laws to conform to an ever-expanding mandate under the Sixth Circuit's construction of the First Amendment. See, *e.g.*, BIO 5 n.3 (noting state law amendment enacted in response to district court's preliminary injunction); Reply App. 1-2 (reproducing newest statutory amendment adopted by Tennessee legislature to conform state law to Sixth Circuit's decision in this case, which amendment is expressly conditioned on outcome of this case in this Court to avoid any prospect of mootness).

To be sure, respondents correctly note (at 13 & n.9) that their suit is not limited to existing businesses and entertainers. Rather, they brought a facial overbreadth challenge to the entire Ordinance, including the provisions applicable to "new" businesses and entertainers. Under those provisions, the administrative ruling is effective immediately. See Ord. §§ .040(E)(2) & (4), .070(D)(2) & (4). Respondents err, however, in contending that this case is an inappropriate vehicle to decide the question presented with respect to "new" applicants.

Respondents' argument (at 4) is that the Sixth Circuit concluded that the common law writ of certiorari in Tennessee, as in other states, gives a court the power "to deny a petition for issuance of the writ, and never then reach the merits of the issues sought to be reviewed." That much is true. But respondents err in baldly asserting (at 5) that the consequence of the trial court's discretion is that the Ordinance "does not even provide prompt *access* to a judicial forum" (emphasis in original). The Ordinance guarantees that petitioner will issue its administrative decision promptly on a fixed time-table. See Pet. 3 (citing Pet. App. 99a-100a).[2] As noted, the applicant may then immediately file in court its request for certiorari, which sets out all of its claims. This process guarantees "prompt access" to a judicial officer just as much as a provision immediately permitting the adult business to file a "notice of appeal." For this reason, the courts adopting the majority view that "prompt access" to judicial review satisfies the First Amendment sustain measures that, like the Ordinance in this case, do not guarantee when the court will consider the adult business's appeal. See *Baby Tam & Co.* v. *City of Las Vegas*, 154 F.3d 1097, 1101 (CA9 1998) ("The Fifth and Seventh Circuits have held that prompt access to judicial review is sufficient, even if there is no time frame for *a hearing* or a decision on the merits." (emphasis added) (citing

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[2] Thus, although the majority below noted that the First Amendment requires a municipality to make its administrative ruling "within a specified, brief period" (Pet. App. 33a n.8), there is no dispute that the Ordinance satisfies that requirement.

TK's Video, Inc. v. *Denton County, Tex.*, 24 F.3d 705, 709 (CA5 1994); *Graff* v. *City of Chicago*, 9 F.3d 1309, 1324-25 (CA7 1993) (en banc), *cert. denied*, 511 U.S. 1085 (1995))).

Furthermore, respondents' emphasis that the Ordinance permits businesses and entertainers to appeal through common law certiorari procedures only highlights that this is an ideal vehicle to resolve the circuit split. The circuits that reject the Sixth Circuit's "prompt judicial decision" requirement hold that indistinguishable discretionary common law certiorari procedures satisfy the First Amendment. Indeed, those decisions lie at the heart of the circuit conflict presented by this case. As the Eleventh Circuit has explained:

> Some courts have considered the holding in [*Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975)] to be a requirement that the statute, regulation or ordinance explicitly provide for prompt judicial review of the decision to suppress expressive activity. Yet, other courts have since distinguished *Southeastern* on its facts to hold that non-statutory judicial access, *usually access through a state's common law writ of certiorari*, is sufficient.
>
> Much of the confusion flows from the Supreme Court's plurality opinion in *FW/PBS*.

Cannabis Action Network v. *Gainesville*, 231 F.3d 761, 774 nn.18 & 19 (CA11 2000) (citing *Redner* v. *Dean*, 29 F.3d 1495 (CA11 1994) (adult-business case)), *vacated and remanded*, 122 S. Ct. 914 (2002). The Seventh Circuit has similarly explained:

> In Illinois, judicial review of a decision to deny a permit application may be had in state court by a writ of *common law certiorari*. This is not good enough, according to MacDonald: MacDonald argues that the *Freedman* "prompt judicial review" safeguard requires more than a possibility of judicial review--it requires the guarantee of a prompt decision on the merits.
>
> *The circuits are split on this issue.*

MacDonald, 243 F.3d at 1035 (emphasis added). See also, *e.g.*, *Thomas* v. *Chicago*, 227 F.3d 921, 926 (CA7 2000) (holding

that common law certiorari satisfies *FW/PBS*) (citing *Graff* v. *City of Chicago*, 9 F.3d 1309 (CA7 1993) (en banc), *cited in Thomas*, 122 S. Ct. at 781)); *Stratton* v. *Wenona Comm. Unit Sch. Dist.*, 551 N.E.2d 640, 646 (Ill. 1990) (explaining that writ is discretionary under Illinois law).

Respondents' related argument only reinforces that the conflict *is* squarely presented as to both "new" and "existing" entertainers and businesses: "Petitioner admits that the Metropolitan code does not 'guarantee that the appeal will be decided by a date certain'" (BIO 4 (quoting Pet. 2)) because "there is no time limit for a court to decide upon whether to grant the petition or not" (*id.* 5). Precisely: although the Ordinance grants applicants "prompt access" to judicial review by permitting them to file an immediate appeal (see §§ 6.54.040(E)(2), .070(D)(2), .110(M), .150(E)(6)), the Ordinance does not guarantee them a "prompt judicial decision."[3]

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[3] Respondents err in asserting, without any citation to Tennessee law, that a trial court has the "absolute discretion" to deny the writ. It has long been settled in Tennessee that common law certiorari will be granted if the applicant makes out a "prima facie" entitlement to the writ. *Rhea County* v. *White*, 43 S.W.2d 388, 397 (Tenn. 1931). And a trial judge's holding that an applicant is not entitled to a writ of certiorari is itself subject to appellate review. See, *e.g.*, *Armstrong* v. *Tennessee Dep't of Corr.*, No. M2000-02328-COA-R3-CV, 2001 Tenn. App. LEXIS 428 (App. June 7, 2001) (reviewing substance of First Amendment claim to determine whether trial court abused its discretion in denying common law writ); see also, *e.g.*, *Robinson* v. *Clement*, 65 S.W.3d 632 (Tenn. Ct. App. 2001); *Robinson* v. *Traughber*, 13 S.W.3d 361 (Tenn. Ct. App. 1999). Furthermore, respondents' own argument is self-defeating: if respondents are correct that the First Amendment is satisfied only by granting the writ of certiorari in appeals from adult-business licensing decisions, then state judges will be required to grant the writ by their duty to enforce the Federal Constitution. See U.S. Const., Art. VI; *Huffman* v. *Pursue*, 420 U.S. 592, 611 (1975); *Martin* v. *Hunter's Lessee*, 14 U.S. 304, 341-44 (1816) (Story, J.); cf. Pet. 10 n.8 (explaining that respondents' position relies on the unsupportable premise that state judges will fail to enforce the Constitution).

Indeed, this case is plainly an ideal vehicle to resolve the circuit conflict because the second question raised by the Petition (which relates to the additional procedural protections the Ordinance provides) presents this Court with the opportunity to address thoroughly the timing for judicial review required by the First Amendment. As the Petition explained (at 11) and respondents do not dispute, assuming this Court adopts the minority view that "prompt access" to judicial review does not satisfy the Constitution, question two allows the Court to address whether other measures short of guaranteeing a "prompt judicial decision" – such as a stay of adverse administrative rulings and the issuance of an interim license – are sufficient under the First Amendment. A definitive ruling on the constitutionality of these measures is essential because, as respondents must concede, a municipality is powerless to require a state court to issue a "prompt judicial decision."

3. Respondents' passing merits argument (at 16) is wrong for the reasons set forth in the briefs on the merits in support of the municipalities in *City News & Novelty* and *Thomas*, *supra*, which are easily summarized. The cases on which respondents rely all addressed measures that authorized administrators to prohibit speech based on its *content*. See *Southeastern Promotions* v. *Conrad*, 420 U.S. 546 (1975) (municipal review board authorized to deny permission to stage production based on production's content)[4]; *Blount* v. *Rizzi*, 400 U.S. 410 (1971) (Postmaster General authorized to seize materials he deemed obscene). By contrast, an adult-business licensing ordinance does not involve content-based determinations and thus "does not present the grave 'dangers of a censorship system.'" *FW/PBS, Inc.* v. *Dallas*, 493 U.S. 215, 229 (1990) (plurality) (quoting *Freedman*, 390 U.S. at 58).

Moreover, the two prophylactic concerns underlying the requirement that censorship schemes guarantee a "prompt

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[4] Respondents' claim (at 11, 16) that the Tennessee common law writ of certiorari was at issue in *Southeastern Promotions* is just wrong. That case instead concerned a municipal censorship scheme that "did not provide a procedure" for judicial review. 420 U.S. at 561.

judicial decision" are absent in the context of adult-business licensing. Although courts have expertise in determining whether the content of speech is constitutionally protected (*Freedman*, 380 U.S. at 58), it is instead *municipalities* that have greater expertise in the workaday determination whether any particular business, including an adult business, is in compliance with a municipal code. And there is little or no risk that an adult business will engage in "self-censorship" (*id.*): "The license applicants * * * have much more at stake than did the motion picture distributor considered in *Freedman*, where only one film was censored. Because the license is the key to the applicant's obtaining and maintaining a business, there is every incentive for the applicant to pursue a license denial through court." *FW/PBS*, 493 U.S. at 229-30 (plurality).

4. Nor is there any merit to respondents' remaining argument (at 6-11) that the scope of review on common law certiorari is insufficiently searching to satisfy the First Amendment. Preliminarily, that argument plainly presents no obstacle to review in this Court, given that the same standard applied under the ordinances at issue in both *City News & Novelty* and *Thomas*. See *Hanrahan* v. *Williams*, 673 N.E.2d 251, 273 (Ill. 1996) (Illinois common law certiorari cannot overturn factual determinations unless "against the manifest weight of the evidence"); *City News & Novelty* v. *Waukesha, WI*, 604 N.W.2d 870, 876 (Wis. App. 1999) (inquiry under Wisconsin certiorari procedure is whether municipal action was "arbitrary" and "the evidence was such that the board might reasonably make the order or determination in question"), *cert. dismissed as moot*, 531 U.S. 278 (2001). Furthermore, the scope of judicial review (as opposed to its timing) would be left for remand rather than decided by this Court in the first instance because that issue (i) is not included within the question presented, (ii) is not the subject of a circuit conflict that would merit review in this Court; (iii) was not decided by the majority below, and (iv) turns on a disputed question of state law – *viz.* the extent to which constitutional claims can be raised *via* the common law writ in Tennessee.

In any event, respondents are wrong to contend that the scope of review provided by Tennessee common law certiorari violates the First Amendment, a claim that no judge has accepted and that the district judge and the dissenting judge below both rejected in concluding that the Ordinance is constitutional. See Pet. App. 40a, 106a. Respondents correctly state (at 6) that common law certiorari in Tennessee, unlike statutory certiorari, does not permit the judge to hold a "trial *de novo*" to "reconsider and redetermine all the issues of fact, as well as law as if no such determination had been previously made" (*Hooser* v. *Warren County Bd. of Educ.*, 807 S.W.2d 230, 236 (Tenn. 1991)). Instead, any factual claims by the adult business turn on whether there was "material evidence to support the agency's findings." *Davison* v. *Carr*, 659 S.W.2d 361, 363 (Tenn. 1983), *quoted in Cooper* v. *Williamson County Bd. of Educ.*, 746 S.W.2d 176, 179 (Tenn. 1987). Contra BIO 10 (erroneously claiming, without citation, that administrative fact-finding is "*immune*" from review on common law certiorari (emphasis in original)). But, as respondents themselves explain (at 8), the factual claims that arise under the Ordinance "[i]mplicat[e] no constitutional or procedural issues whatsoever"; instead, the factual issues involve matters such as whether the applicant needs "to clean a number of couches, restroom walls, fixtures and shower stalls; repair a commode; and provide covered waste containers." See also *id.* at 9 ("repair a hand sink, clean some walls, air conditioning vents and storage areas"; "eliminate storage that may attract rodents and insects"; "clean the restroom floors, and provide covered trash cans").[5]

The First Amendment does not require, and common sense does not suggest, that a court should throw out the administrative fact-finding on those issues, which as noted falls squarely within the realm of municipal expertise. Although

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[5] Although respondents go beyond the record to state (at 7) that 15 applicants were initially denied licenses under the Ordinance, the more salient fact is the one they omit: that all 15 (including the six adult businesses at issue in this case) were granted licenses once they made needed repairs.

respondents hope to suggest that the administrative fact-finding might relate to the *content* of an adult business's speech – such as "violations of obscenity, indecent exposure and public nudity laws" (BIO 8 n.5) – those facts are determined in separate criminal or nuisance proceedings, *not* at the administrative licensing stage.[6] The "performance standards" to which respondents euphemistically refer (*id.*) concern not First Amendment expression, but instead sex acts, prohibiting (for example) an applicant to "*perform* or allow customers, employees or entertainers to *perform* sexual intercourse or oral or anal copulation or other contact stimulation of the genitalia on the premises" (emphasis added).

Nor are the types of claims that adult businesses can raise pursuant to Tennessee common law certiorari so limited as respondents hope to suggest. "The legislative and judicial history of this State manifests a strong purpose not to curtail the right to review by the writ of certiorari the exercise of judicial power by inferior or quasi-judicial tribunals." *Rhea County* v. *White*, 43 S.W.2d 375, 377 (Tenn. 1931). The matters reviewable under the writ manifestly include a "violation of constitutional or statutory provisions" (*Massey* v. *Shelby County*

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[6] See, *e.g.*, Ord. § .050(B)(5) ("No applicant shall have been found to have previously violated Section 17.36.260 of the metropolitan zoning code, applicable to sexually oriented/adult entertainment businesses, as evidenced by the judgment of a court within one year immediately preceding the date of the application."); *id.* § .080(A)(2) ("No applicant convicted of a crime of a sexual nature, as defined in Section 6.54.010, in any jurisdiction shall be eligible to receive a permit for the time period described below.").

Respondents also imagine scenarios that have never arisen, such as an individual who claims that he has been misidentified as a person with a prior conviction or an entity that disputes it is an adult business. These hypothetical examples, however, are not susceptible of a First Amendment facial overbreadth challenge like respondents' suit. See *City of Chicago* v. *Morales*, 527 U.S. 41, 52 (1999) ("[T]he overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when 'judged in relation to the statute's plainly legitimate sweep.'" (quoting *Broadrick* v. *Oklahoma*, 413 U.S. 601, 612-15 (1973)).

Retirement Bd., 813 S.W.2d 462, 464 (Tenn. Ct. App. 1991)) because the writ inquires whether the administrative decision maker acted "in violation of constitutional or statutory provisions or in excess of its own statutory authority; has followed unlawful procedure or been guilty of arbitrary or capricious action; or has acted without material evidence to support its decision" (*Watts* v. *Civil Service Bd.*, 606 S.W.2d 274, 277 (Tenn. 1980), *cert. denied*, 450 U.S. 983 (1981)). For example, in *Watts*, the Tennessee Supreme Court evaluated whether a Civil Service Board's ruling against a police officer violated the First Amendment under *Pickering* v. *Board of Education*, 391 U.S. 563 (1968).

CONCLUSION

For the foregoing reasons, as well as those stated in the Petition for a Writ of Certiorari, certiorari should be granted.

Respectfully submitted.

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